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IN THE

Supreme Court of the United States

THE KEN ROBERTS COMPANY, UNITED STATES CHART COMPANY, KEN ROBERTS INSTITUTE, INC., and THE TED WARREN CORPORATION,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the authority of the Federal Trade Commission ("FTC") to investigate and regulate the advertising activities of Commodity Trading Advisors ("CTAs") that are registered with and regulated by the Commodity Futures Trading Commission ("CFTC") has been expressly or implicitly repealed by the Commodity Exchange Act's ("CEA") grant of "exclusive jurisdiction" to the CFTC "with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery."

2. Whether the authority of the FTC to investigate and regulate the advertising activities of investment advisers has been implicitly repealed by the pervasive scheme of regulation regarding the activities of investment advisers set forth in the Investment Advisers Act of 1940 ("IAA").

3. Whether the court below violated this Court's long-established principle that where a subsequent statute applies different statutory standards and penalties to the same activity as an earlier statute, the earlier statute is implicitly repealed by the later enactment. In the instant case, the court below upheld the authority of the FTC to investigate whether certain conduct of CTAs and investment advisers violates an antifraud provision of the FTC Act, although it expressly recognized that a subsequently-enacted antifraud provision of the CEA (applicable to CTAs) and a subsequently-enacted antifraud provision of the IAA (applicable to investment advisers) impose different standards of liability and different penalties than the antifraud provision the FTC proposed to enforce.

4. Whether a district court may enforce a governmental agency's subpoena where the agency has no jurisdiction on the facts then known, and there is nothing its investigation might reveal that could establish jurisdiction.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioners The Ken Roberts Company, United States Chart Company, Ken Roberts Institute, Inc., and The Ted Warren Corporation, are all privately-held corporations. None of the Petitioners have parent corporations, and no publicly-held company owns 10 percent or more of Petitioners' stock.

Petitioners are business entities affiliated with Mr. Adrian Kenneth "Ken" Roberts, Jr. The Ken Roberts Company, a registered Commodity Trading Advisor, publishes and markets an educational course that teaches technical principles of trading commodity futures and options to subscribers. United States Chart Company is also a registered Commodity Trading Advisor, and publishes commodity futures price charts that are distributed to subscribers on a periodic basis. Ken Roberts Institute, Inc. published *The Roberts Portfolio* — an advisory service that disclosed to subscribers actual investments made by Mr. Roberts in a segregated investment portfolio account. The Ted Warren Corporation publishes and markets an educational course that teaches the technical principles of trading stocks, and makes stock recommendations in a monthly newsletter. Ken Roberts Institute, Inc. and The Ted Warren Corporation both act as investment advisers under the Investment Advisers Act of 1940.

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Petitioners The Ken Roberts Company ("KRC"), United States Chart Company ("Chart"), Ken Roberts Institute, Inc. ("KRI"), and The Ted Warren Corporation ("Warren") hereby petition for a writ of certiorari to review the opinion issued by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") on December 28, 2001.

OPINIONS BELOW

On May 26, 2000, the United States District Court for the District of Columbia (per Robertson, J.) entered a final order to enforce the FTC's Civil Investigative Demands ("CIDs") against the Petitioners. This order (Appendix [hereinafter, "Pet. App."] at 25a) has not been published.

The Court of Appeals' December 28, 2001, opinion (per Edwards, J., joined by Rogers and Tatel, JJ.) affirming the District Court's order (Pet. App. at 1a) has been published at 276 F.3d 583. The Court of Appeals' subsequent orders denying rehearing and rehearing en banc (*id.* at 27a) and denying a stay of the mandate were not published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion affirming the District Court's order on December 28, 2001, and denied Petitioners' request for a rehearing or rehearing en banc on March 1, 2002. Accordingly, Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1, *et seq.*, are reprinted in the Appendix at 29a and in the Lodging at L-1. The relevant provisions of the Investment Advisers Act of 1940 ("IAA"), 15 U.S.C. §§ 80b-1, *et seq.*, are reprinted in the Appendix at 40a and in the Lodging at L-27. The relevant provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41, *et seq.*, are reprinted in the Appendix at 38a and the Lodging at L-46.

STATEMENT OF THE CASE

Petitioners sell instructional materials that teach course members — prospective investors — about investing in the commodity futures and securities markets.

As required under provisions of the Commodity Exchange Act ("CEA"), Petitioners KRC and Chart are registered with the Commodity Futures Trading Commission ("CFTC") as Commodity Trading Advisors ("CTAs"). Under the CEA, the CFTC has been granted "*exclusive jurisdiction* . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery [*i.e.*, futures contracts], traded or executed on a contract market." 7 U.S.C. § 2(a)(1)(A) (emphasis added). In requiring the registration of CTAs such as petitioners KRC and Chart, and in providing for their regulation, Congress has expressly found that their operations "are *directed toward* and *cause* the purchase and sale of commodities for future delivery on or subject to the rules of contract markets," and that "the foregoing transactions occur in such volume as to *affect substantially transactions on contract markets*." 7 U.S.C. §§ 6*l*(2) and (3) (emphasis added). Indeed, the court below

specifically acknowledged that the CFTC has — and has repeatedly exercised — jurisdiction over the advertising of course materials by KRC and Chart. *Federal Trade Comm'n v. Ken Roberts Co.*, 276 F.3d 583, 584-85 (D.C. Cir. 2001) [hereinafter, "Opinion"] (Pet. App. at 4a-5a).

KRI and Warren act as investment advisers under the Investment Advisers Act of 1940 ("IAA"). Under the IAA, the Securities and Exchange Commission ("SEC") has jurisdiction over the advertising of course materials by KRI and Warren.

In the instant case, the Federal Trade Commission ("FTC") seeks to investigate the Petitioners' advertising practices with a view toward enforcing an antifraud provision of the FTC Act that applies standards and imposes penalties that are materially different from those set forth in the CEA and the IAA. For purposes of that investigation, the FTC served Civil Investigative Demands upon the Petitioners and sought their enforcement by the district court. Before the district court, Petitioners argued that — regardless of any facts that might be adduced in the course of its investigation — the FTC would inevitably lack authority to enforce the antifraud provision of the FTC Act against persons such as they, who are subject to materially different antifraud provisions enacted by Congress as part of the pervasive regulatory statutes that govern their affairs. Although the FTC was unable to suggest any fact affecting its jurisdiction that its investigation might reveal, the district court entered an order enforcing its Civil Investigative Demands.

On appeal, the Court of Appeals recognized that the FTC's investigation would have "no lawful purpose" if the FTC would lack authority to take any action against the

Petitioners regardless of the outcome of its investigation. Quoting this Court's opinion in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Court of Appeals acknowledged that an agency's "subpoena is proper only where 'the inquiry is within the authority of the agency.' " Opinion at 586 (Pet. App. at 8a). But while the court below did not — and could not — suggest any fact that the FTC's investigation might possibly discover that could affect its authority to enforce its antifraud provision against Petitioners, the Court of Appeals nonetheless held that Petitioners' challenge to the FTC's jurisdiction was "premature," stating that it was not "patently clear" that the FTC "lacks the jurisdiction that it seeks to assert" over the Petitioners' advertising activities. *Id.* at 584-85 (Pet. App. at 3a, 6a).

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals' Conclusion That The CFTC Does Not Have Exclusive Jurisdiction Over The Advertising Activities Of KRC And Chart Is Based Upon A Fundamental Misreading Of The CEA And Conflicts With Numerous Decisions Of This Court And Of Other Courts Of Appeals.

"The Commodity Exchange Act . . . has aptly been characterized as 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355-356 (1982) (internal citations omitted). Under its provisions, the CFTC has been granted "sweeping authority to implement the CEA." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836 (1986). The CEA also expressly preempts and repeals the authority of all other agencies — state and federal — to regulate any

of the futures-related matters expressly entrusted to CFTC oversight. Thus, 7 U.S.C. § 2(a)(1)(A) mandates that:

> The [Commodity Futures Trading] Commission *shall have exclusive jurisdiction* . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . or any other board of trade, exchange, or market.

(Emphasis added.)

By this provision, Congress intended "to *avoid unnecessary overlapping and duplicative regulation.*" 120 Cong. Rec. H. 10247 (daily ed. Oct. 9, 1974) (remarks of Rep. W.R. Page, Chairman, House Committee on Agriculture) (emphasis added). *Accord id.* at S. 18866 (daily ed. Oct. 10, 1974) (remarks of Sen. H. Talmadge, Chairman, Senate Committee on Agriculture and Forestry). The "clarifying amendments to the House bill" drafted by the Senate Committee and reflected in the exclusive jurisdiction language ultimately enacted were intended "to make clear that *where the jurisdiction of the Commodity Futures Trading Commission is applicable, it supersedes State as well as Federal agencies.*" S. Rep. No. 93-1131, 93d Cong., 2d Sess. 23 (1974) (Report of the Senate Committee on Agriculture and Forestry) (emphasis added); *accord* S. Rep. No. 93-1194, 93d Cong., 2d Sess. 35 (1974) (Conference Report). Thus, "under the exclusive grant of jurisdiction to the [CFTC], *the authority in the Commodity Exchange Act (and the regulations issued by the Commission) . . . preempt[s] the field insofar as futures regulation is concerned.*" S. Rep. No. 93-1194 at 35 (emphasis added).

1. Contrary To Principles Established By This Court, The Court Of Appeals Failed To Give Due Deference To An Express Congressional Finding That Makes Clear That The Activities Of The CTA Petitioners That The FTC Seeks To Investigate Are Within The Exclusive Jurisdiction Of The CFTC.

The court below recognized that "the CFTC has the clear statutory authority to regulate" the allegedly fraudulent conduct of CTAs that the FTC now seeks to investigate. Opinion at 591 (Pet. App. at 19a). It further acknowledged that "the CFTC has carefully monitored the activities of KRC to determine whether the company had violated various sections of the CEA" and that the CFTC has conducted "at least four separate investigations" to determine the CTA Petitioners' compliance with the antifraud standards of Section 4*o* of the CEA (7 U.S.C. § 6*o*), to which CTAs must conform when directing advertisements to "prospective clients." *Id.* at 584 (Pet. App. at 4a).

However, notwithstanding (1) the broad and mandatory terms of the exclusive jurisdiction provision, (2) the clear and repeated expressions of Congressional intent to preempt the regulatory field "where the jurisdiction of the Commodity Futures Trading Commission is applicable," and (3) the Court of Appeals' own recognition of the CFTC's "clear . . . authority" — and repeated exercise thereof — to regulate the conduct of the CTA Petitioners (*see* Opinion at 584-585 (Pet. App. at 19a)), the court below concluded that, "there is no reason to think that this authority is exclusive." *Id.* at 591 (Pet. App. at 19a). It dismissed as "farfetched" any suggestion "that the advertising and promotion of educational materials" to teach futures trading are among the "transactions

involving" futures contracts that are within the CFTC's exclusive jurisdiction. *Id.* at 589 (Pet. App. at 13a). Thus it held that "the phrase 'accounts, agreements, and transactions involving contracts of sale of a commodity' does not cover the marketing of investor-education courses," which, according to the court below, "leads *only tangentially* to the actual purchase of futures." *Id.* at 592 (Pet. App. at 19a) (emphasis added).

Congress, however, viewed the matter very differently. This is made abundantly clear by the express Congressional findings set forth in Section 4*l* of the CEA (7 U.S.C. § 6*l*), the language of which was noted by the Court of Appeals even as it ignored its substance. *See* Opinion at 589-590 (Pet. App. at 14a-15a). Specifically, Section 4*l* sets forth a Congressional finding of a "national public interest" in the activities of CTAs, in that their "*solicitations* . . . [and] agreements" are distributed and effected in interstate commerce, "their advice, counsel, publications [and] writings ... . are *directed toward* and *cause* the purchase and sale of commodities for future delivery," and "the foregoing *transactions* [*i.e.*, solicitations, agreements, advice, etc.] occur in such volume as to *affect substantially transactions on contract markets*." 7 U.S.C. § 6*l* (emphasis added).

Based upon the direct and substantial causal connection that Congress found to exist between the various enumerated activities of CTAs — embracing the conduct at issue here — and the trading of futures on organized exchanges, Congress gave the CFTC broad regulatory authority over these CTA activities. The CEA requires, among other things, that all CTAs register with the CFTC and that they retain and produce to the CFTC "samples or copies of all . . . letters, circulars, memorandums, publications, writings, or other literature . . .

distributed to clients . . . or prospective clients" upon request. 7 U.S.C. §§ 6m(1), 6n(1), 6n(3)(A). Congress also granted broad rulemaking authority to the CFTC, which the agency has invoked to regulate CTA advertising and to require that certain minimum disclosures be made to prospective clients of CTAs. 17 C.F.R. §§ 4.31, 4.41. In addition, the CFTC has been authorized to enforce the broad antifraud provisions of Section 4*o* of the CEA for the protection of "any client . . . or *prospective client*" of a CTA. 7 U.S.C. § 6*o* (emphasis added). Moreover, the CFTC may impose significant sanctions for any violations, including civil money penalties and revocation of a CTA's registration, without which it may not lawfully conduct its business. 7 U.S.C. § 9. Particularly when read in light of these regulatory provisions, the Congressional findings set forth in Section 4*l* of the CEA (7 U.S.C. § 6*l*) unambiguously informs the scope of the CFTC's exclusive jurisdiction regarding the activities of CTAs.

The intent of Congress is clear: CTA advertising and promotional activities directed towards "prospective clients" are among those "*transactions*" that ultimately "*cause* the purchase and sale of commodities for future delivery" and "*affect substantially*" the trading of futures on organized markets. 7 U.S.C. §§ 6*l*(2), (3) (emphasis added). Hence, they are among those "transactions *involving*" futures that are subject to the CFTC's *exclusive* jurisdiction. 7 U.S.C. § 2(a)(1)(A) (emphasis added).

The Court of Appeals' dismissive treatment of Section 4*l* as nothing more significant than a "separate provision in the statute" (Opinion at 589 (Pet. App. at 14a)) is plainly at odds with the explicit and determinative Congressional findings that Section 4*l* contains. Since Congress found and articulated in Section 4*l* a direct and substantial causal

connection between a CTA's marketing and advisory activities and the trading of futures on an exchange, the Court of Appeals' finding of only a "*tangential*" relationship between the marketing of investor-education courses and the trading of futures is nothing less than a substitution of its judgment for that of the Congress on a truly dispositive matter. *See id.* at 592 (Pet. App. at 20a) (emphasis added).

This Court has repeatedly held that conclusions reached by the Congress "are entitled to much deference." *City of Boene v. Flores*, 521 U.S. 507, 536 (1997). A "court must defer to a congressional finding . . . if there is any rational basis for such a finding" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Although courts may "independently evaluate . . . congressional findings . . . this 'is not a license [for courts] to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [their] own,' " *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001). In contravention of these and numerous similar authorities, that is precisely what the court below has done.[1]

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1. A direct conflict between the Court of Appeals' decision and the reasoning and principles established by this Court presents a strong basis for the issuance of a writ of certiorari. *See* Supreme Court Rule 10(c); *see, e.g.*, *United States v. Doe*, 465 U.S. 605, 610 (1984) (writ of certiorari granted "to resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding in [a prior case]"); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (writ of certiorari granted because ruling below "appears to be inconsistent with prior decisions of this court").

2. The Decision Below Conflicts With The Opinions Of Other Courts Of Appeals Regarding The Interpretation And Application Of The Exclusive Jurisdiction Provision Of The CEA.

Consistent with the clear and authoritative expressions of Congressional intent referenced above, this Court has recognized that "[t]he purpose of the exclusive jurisdiction provision . . . was to separate the functions of the [Commodity Futures Trading] Commission from those of the Securities and Exchange Commission and other regulatory agencies." *Curran, supra*, 456 U.S. at 386 (footnotes omitted). *See also Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 477 n.12 (1997) ("§ 2(i) provides the CFTC with exclusive jurisdiction over far more" than just options). Contravening that purpose, the Court of Appeals held that the CFTC's exclusive jurisdiction concerns only "certain aspects of the futures trading market" covering only "a limited, discrete set of items relating to the making of futures contracts." Opinion at 588, 589 (Pet. App. at 12a, 14a).

As a result of its severely constricted reading of the CEA, the opinion of the court below is the *only* decision by any court of appeals (or by the highest court of any state) that has ever permitted another regulatory agency — federal or state — to exercise any jurisdiction over activities "involving" futures that are subject to CFTC regulation. In sharp contrast, the Court of Appeals for the Seventh Circuit has twice held the SEC without jurisdiction over such matters. *See Chicago Mercantile Exch. v. Securities and Exch. Comm'n*, 883 F.2d 537 (7th Cir. 1989); *Board of Trade v. Securities and Exch. Comm'n*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). The Court of Appeals for the Tenth Circuit has applied the same principle with regard to commodity options. *See Securities and Exch.*

Comm'n v. American Commodity Exch., Inc., 546 F.2d 1361 (10th Cir. 1976). Further, the highest courts of at least three states have similarly recognized that enforcement actions involving options and leverage contracts by state agencies have been preempted by the CFTC's "exclusive jurisdiction." *See International Trading Ltd. v. Bell*, 556 S.W.2d 420 (Sup. Ct. Ark. 1977); *Clayton Brokerage Co. v. Mouer*, 546 S.W.2d 805 (Sup. Ct. Tex. 1975); *Minnesota v. Coin Wholesalers, Inc.*, 250 N.W.2d 583 (Sup. Ct. Minn. 1977) (dicta).

In contrast to these and many other opinions recognizing the broad preemptive intent and effect of the exclusive-jurisdiction provision, the court below has read the remedial provisions of the CEA very narrowly. For example, according to the court below, the term "transactions" as used in the CEA's exclusive jurisdiction clause refers only to a narrow "set of arrangements directly related to the actual sale of commodities futures," or "a set of actions closely linked to the actual trading of commodities." Opinion at 590 (Pet. App. at 16a). Indeed, as construed by the court, the term adds little if any scope to the exclusive-jurisdiction provision beyond the "accounts" and "agreements" involving futures, to which the provision otherwise refers. *Id.* at 589-590 (Pet. App. at 12a-16a).

This reading of the CEA effectively ignores that the grant of "exclusive jurisdiction" was expressly intended to "preempt the field," "supersede[ ] . . . [other] Federal agencies," and "avoid unnecessary overlapping and duplicative regulation" (*see* discussion at 4-5, *supra*). For that purpose, the exclusive-jurisdiction provision is not limited to futures "accounts, agreements and transactions," but broadly encompasses all "accounts, agreements . . . and transactions *involving*" futures. The court's interpretation ignores as well that the operative provisions of the CEA demonstrate, beyond

serious debate, the full range of activities that were considered by the Congress to "involve" futures trading. *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235-236 (1947) ("as we read the [United States Warehouse] Act, Congress in effect said that the policy which it adopted in . . . [specific provisions of the Act] was exclusive of all others"). By effectively reading the term "involving" out of the statute, the court below has rewritten and severely limited the exclusive jurisdiction provision.

The views of the court below conflict sharply with those expressed by the Court of Appeals for the Seventh Circuit in *Board of Trade*, *supra*, 677 F.2d 1137 (7th Cir. 1982), which recognized that

> Congress understood the difference between 'transactions *in*' and 'transactions *involving*.' Had Congress meant to limit CFTC exclusive jurisdiction to transactions in commodity futures, it would have said so . . . . Instead, the legislative history clearly indicates that Congress intended 'transactions involving' to import something more than 'transactions in' (or options on) commodity futures.

Id. at 1146; *cf. Dunn*, 519 U.S. at 478 (options on foreign currency are "transactions '*involving*' *or related to* the sale of foreign currency for future delivery") (emphasis added).

Moreover, insofar as the court below has consequently held that the FTC and the CFTC have "concurrent" jurisdiction over transactions that "involve" futures (*see* Opinion at 591-592 (Pet. App. 18a-19a)), its ruling conflicts directly with that of the Seventh Circuit in *Chicago Mercantile Exchange*, 883 F.2d 537 (7th Cir. 1989) [hereinafter "*CME*"]. *CME* involved the regulation of futures that the SEC had

undertaken to classify as "stock" or some other form of "security." *Id.* at 541. Regarding this assertion of jurisdiction by the SEC, Judge Easterbrook's opinion aptly observed that where, as here, "accounts, agreements . . . [or] transactions involving" futures were said to be involved, "*a dispute about the agencies' jurisdiction is a zero-sum game because of the exclusivity clauses in the CEA.*" *Id.* at 547 (emphasis added). Consistent with that court's reasoning, activities that any agency other than the CFTC might seek to regulate either do or do not "involve" futures contracts. If they do, the CFTC has jurisdiction; if they do not, the CFTC lacks jurisdiction. And, as the court held in CME, "if the CFTC has jurisdiction, its power is exclusive." *Id.* at 548.

Here, the Court of Appeals acknowledged that "the CFTC has the clear statutory authority to regulate a CTA's deceitful 'practices' " of the kind the FTC seeks to investigate. Opinion at 591 (Pet. App. at 19a). If the Seventh Circuit's analysis in *CME* were applied in these circumstances, the CFTC would be recognized not only to have jurisdiction, but to have *exclusive* jurisdiction over the Petitioners' allegedly fraudulent advertising practices. Thus the holding of the court below conflicts directly with the reasoning and holding of the Seventh Circuit in *CME*. This conflict is ripe for review and resolution by this Court.[2]

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2. Strong grounds for the issuance of a writ of certiorari exist where — as here — the decision of a federal court of appeals is in direct conflict with the ruling of other courts of appeals on the same matter of federal law. *See* Supreme Court Rule 10(a); *see, e.g.*, *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits").

B. The Court of Appeals' Conclusion That There Has Been No Implied Repeal Of The FTC's Authority To Enforce The FTC Act's Antifraud Provision Against Registered CTAs And Investment Advisers Directly Conflicts With Prior Decisions Of This Court.

The decisions of this Court have established that

> [t]here are two well-settled categories of repeals by implication: (1) [w]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas v. National City Bank, 296 U.S. 497, 503 (1936); *see also Red Rock v. Henry*, 106 U.S. 596, 601 (1882).

1. There Is An "Irreconcilable Conflict" Between The FTC Act's Antifraud Provision And The Antifraud Provisions Contained In The CEA and IAA; In Holding Otherwise, The Court Of Appeals Disregarded And Failed To Apply Relevant Principles Long Established By This Court.

In its seminal decision in *United States v. Tynen*, 78 U.S. 88 (1870), this Court established that a "clear repugnancy" mandating an implied repeal of earlier legislation must be found when two statutory provisions impose different standards regarding the same activities. In *Tynen*, this Court found a "clear repugnancy" effecting an implied repeal where — as in the case at bar — the second, later statute "*permits what the first law prohibits*." *Id.* at 93 (emphasis added).

Likewise, there is a "clear repugnancy" here. Using substantially identical language, the CEA and the IAA prohibit the employment of "any device, scheme, or artifice to defraud any client or prospective client," and conduct that "operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6; 7 U.S.C. § 6*o*. In sharp contrast, the FTC Act proscribes "*unfair*" as well as "deceptive acts or practices." 15 U.S.C. § 45(a)(1) (emphasis added). It follows from this material difference that behavior that would not constitute an antifraud violation under the CEA and IAA might nonetheless support enforcement action under the FTC Act's broader "unfair" standard. Thus, the CEA and IAA "permit[ ] what the first law [here, the FTC Act] prohibits." Given this "clear repugnancy," it follows that the antifraud provision of the FTC Act has impliedly been repealed insofar as the conduct of CTAs and investment advisers is concerned.[3]

The Court of Appeals acknowledged that the IAA and the FTC Act "employ different verbal formulae to describe their antifraud standards." It nevertheless concluded that the antifraud provisions of the IAA and the FTC Act are "capable of co-existence." Opinion at 593 (Pet. App. at 22a).[4] It reasoned

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3. Indeed, the FTC itself has admitted that the standards between the FTC Act on the one hand, and the CEA and IAA on the other hand, are contradictory: "the agencies enforce different regulatory standards." FTC Reply at 4 n.6. More recently, in its opposition to the Petitioners' motion for stay of the Court of Appeals' mandate, the FTC again acknowledged that "[t]he FTC Act, the CEA and the IAA contain different . . . standards . . . . *[T]he CFTC and the SEC enforce statutory standards that differ from the FTC Act — only the FTC may pursue 'unfair' practices*." Stay Opposition at 6-7. (Emphasis added).

4. As discussed below, the Court of Appeals addressed the implied repeal issue only with regard to the IAA and the FTC Act. (Cont'd)

that the materially different antifraud standards contained in the IAA and FTC Act could and should be reconciled simply by treating them as cumulative. Thus, it held that that the investment adviser Petitioners are required to comply not only with the standards prescribed by the IAA, but also with the stricter standards contained in the FTC Act. *See id.*

In doing so, the Court of Appeals plainly ignored the applicable decisions of this Court. In *Tynen* and ever since, this Court has made clear that the enactment of legislation imposing new and different statutory standards to activities covered by earlier legislation occasions an implied repeal of the earlier legislation. *See, e.g., Gordon v. New York Stock Exch.*, 422 U.S. 659, 689 (1975).[5]

The Court of Appeals also completely ignored that different penalties are imposed for a violation of the antifraud provision

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(Cont'd)

It never addressed the Petitioners' further demonstration that the *CEA* likewise repeals by implication the FTC's antifraud authority over *CTAs*.

5. The Court of Appeals wrongly relies on *Morton v. Mancari*, 417 U.S. 535 (1974) to support its "capable of coexistence" conclusion. *Mancari* held that the Equal Employment Opportunity ("EEO") Act did not repeal by implication a statutory preference favoring Native Americans in the filing of vacancies within the Bureau of Indian Affairs because Congress expressly recognized "the longstanding federal policy of providing a unique legal status to Indians" (*id.* at 548), and *manifestly intended* the two statutes to be "capable of coexistence." In contrast, here there is no hint of legislative intent for the FTC Act to be reconciled with either the IAA or the CEA; indeed, all evidence is to the contrary.

of the FTC Act than for violation of the antifraud provisions of the CEA or IAA. "[U]nfair or deceptive" acts in violation of the FTC Act are punishable by a court's imposition of "a civil penalty of not more than $10,000 for each violation." 15 U.S.C. § 45(m)(1)(A).[6] In contrast, under the IAA, monetary penalties are assessable by the SEC. The amount imposed for fraudulent conduct is governed by strict guidelines which take into account whether the fraud "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 80b-9(e)(2).[7]

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6. In determining the amount to be levied, courts must "take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." 15 U.S.C. § 45(m)(1)(C). Under the FTC Act, there is no inquiry into whether the violation resulted in consumer losses; the "determination of the amount of penalties within the maximum is committed to the informed discretion of the district judge." *United States v. J.B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974); *see United States v. ITT Continental Baking Co.*, 485 F.2d 16, 21 (10th Cir. 1973). The FTC may also seek "disgorgement of profits, rescission of contracts and reimbursement of consumers." *Federal Trade Comm'n v. Pioneer Enter., Inc.*, 1992 U.S. Dist. LEXIS 19699 at *10 (D. Nev. Nov. 12, 1992) (citing *Federal Trade Comm'n v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)); *see* 15 U.S.C. § 45(b).

7. Under the IAA, if an investment adviser's fraud did not result in such losses (or risk thereof), the monetary penalty cannot exceed "$50,000 for a natural person or $250, 000 for any other person, or the gross amount of [the investment adviser's] pecuniary gain . . . as a result of the violation"; if, however, the fraud resulted in substantial losses to others, the monetary penalty is capped at "$100,000 for a natural person or $500,000 for any other person, or the gross amount of [the investment adviser's] pecuniary gain . . . as a result of the violation." 15 U.S.C. § 80b-9(e)(2).

Moreover, under the CEA the CFTC may "assess . . . a civil penalty of not more than the higher of $100,000 or triple the monetary gain" to the violator. 7 U.S.C. § 9.[8]

In view of these material distinctions, the requirements of the FTC Act cannot be reconciled with the IAA or CEA by the simple expedient of forcing the Petitioners to abide by the more stringent standard of the FTC Act. Under *Tynen* and subsequent decisions, if "a later statute again describes an offense created by a former statute, and affixes a *different punishment* to it, varying the procedure . . . *the later [statute] operates by way of substitution, not cumulatively*, and the former statute is repealed." *United States v. Claflin*, 97 U.S. 546, 551 (1878) (emphasis added); *Karlin v. Foust*, 188 F.3d 446, 469 (7th Cir. 1999) (another example of how two statutes create an "irreconcilable conflict" requiring implied repeal of the earlier statute).

It bears emphasis that the Court of Appeals addressed the implied repeal of the FTC Act's antifraud provision only with regard to the IAA. It never addressed the Petitioners' demonstration that the mutual repugnancy between the antifraud provisions of the FTC Act and CEA would similarly effect a repealed by implication of the FTC Act insofar as the conduct of CTAs is concerned — even if one were to disregard the express repeal effected by the CEA's exclusive

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8. "In determining the amount of the money penalty," the CFTC is required to "consider the appropriateness of such penalty to the gravity of the violations." 7 U.S.C. § 9a(1). The CFTC may also prohibit a violator from trading futures or derivatives on organized exchanges and revoke or suspend the registration of persons registered with the CFTC, for example, as CTAs. 7 U.S.C. § 9. Where appropriate, the CFTC may also "require restitution to customers of damages proximately caused by violations." *Id.*

jurisdiction provision. Indeed, with regard to the CEA, the repeated expressions of legislative purpose quoted above makes clear that the court below again substituted its policy judgment for that of Congress when it concluded that

> [u]ndoubtedly, entities in [Petitioners'] position can — and of course should — refrain from engaging in both 'unfair and deceptive acts or practices,' [as required by the FTC Act] and any transaction, practice, or course of business which operates as a fraud or deceit upon a client or prospective client [as required by both the IAA and the CEA].

Opinion at 593 (Pet. App. at 22a).

Congress did not take pains to enact new industry-specific CEA and IAA antifraud standards and penalty regimes just so they could — at birth — be obviated by the standards of the FTC Act; indeed, if Congress intended the FTC Act's standard to be the applicable yardstick, there would have been no need to enact the antifraud provisions of the CEA and IAA. The Court of Appeals' ruling does not "reconcile" the statutes' antifraud provisions; rather, it eviscerates the later statutory enactments. Here, applying the principles established and repeatedly applied by this Court, the "repugnancy" between the relevant statutes is "clear and manifest." *United States v. Borden Co.*, 308 U.S. 188, 199 (1939). Hence, the FTC was and is "patently without jurisdiction" over the activities of the Petitioners that it seeks to investigate.

2. Contrary To Numerous Decisions Of This Court, The Court Of Appeals Failed To Recognize That The Pervasiveness Of The Regulatory Schemes Under The CEA And The IAA — And The Specific Remedies They Provide — Have Impliedly Repealed The Jurisdiction Of The FTC With Regard To CTAs And Investment Advisers.

If a "later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate . . . as a repeal of the earlier act." *Posadas*, 296 U.S. at 503. *Accord Tynen*, 78 U.S. at 92; *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).[9] In other words, pervasiveness may suffice to show Congressional intent to repeal by implication.

Here, the CEA and the IAA set forth comprehensive schemes of regulation regarding, respectively, the conduct of CTAs and investment advisers. The regulatory provisions of the CEA provide for the designation and regulation of trading facilities (7 U.S.C. §§ 7-7b, 8(a)), require registration of all futures industry professionals and firms, including CTAs (7 U.S.C. § 6m), and establishes recordkeeping and reporting obligations and other requirements regarding the conduct of their affairs (7 U.S.C. §§ 6n, 6*o*). The CEA grants broad authority to the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions

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9. *See also Middlesex City Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 28 (1981) ("a comprehensive remedial scheme can evidence a Congressional decision to preclude other remedies"); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 389 (1974) ("the ongoing supervision entrusted to the [agency] . . . is broad enough" to find implied repeal).

or to accomplish any of the purposes of this Act" (7 U.S.C. § 12a(5)), pursuant to which the CFTC has adopted detailed requirements concerning the full range of its responsibilities (*see, e.g.*, 17 C.F.R. §§ 4.1-4.16, 4.30-4.41). Further, it provides the CFTC with an all-encompassing panoply of investigative and enforcement powers, including subpoena power, the authority to seek injunctions before a court and the ability to initiate administrative proceedings in which it may impose civil money penalties, suspend trading privileges and to deny, suspend, or revoke the registration of CTAs, among others. *See generally* 7 U.S.C. §§ 9, 9a, 12a(1), 13b, 15.

Pursuant to this pervasive regulatory scheme, as the court below has acknowledged, "[s]ince 1994, the CFTC has carefully monitored the activities of KRC to determine whether the company had violated various sections of the CEA, particularly the statute's antifraud provisions," conducting "at least four separate investigations." Opinion at 584-585 (Pet. App. 4a).

Investment advisers such as KRI and Warren are likewise subject to pervasive SEC regulation under the IAA. 15 U.S.C. §§ 80b-1 *et seq.* Similar to the analogous provisions set forth in the CEA, investment advisers are required by the IAA, *inter alia*, to register with the SEC (15 U.S.C. § 80b-3); maintain their books and records in a specifically prescribed manner (15 U.S.C. § 80b-4); to submit to periodic and other examinations regarding their activities (*id.*); and to make such annual and other reports as the SEC may prescribe. *Id.* Most pertinently, they are also subject to the IAA's specific antifraud provisions, which prohibit "any device, scheme, or artifice to defraud any client or prospective client" as well as "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective

client." 15 U.S.C. §§ 80b-6(1), (2). In fact, all persons *acting* as investment advisers — regardless of whether they are registered as such — are subject to SEC regulation and enforcement. *See Teicher v. Securities and Exch. Comm'n*, 177 F.3d 1016, 1017 (D.C. Cir. 1999); *cf. United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 730 (1975) (stating that the Investment Company Act of 1940 contains a "pervasive regulatory scheme").

The pervasiveness of the scheme of regulation under the IAA and CEA demonstrates that any authority the FTC might otherwise have had over investment advisers and CTAs has long since been implicitly repealed. As demonstrated above, the antifraud provisions of both the IAA and CEA "cover[ ] the whole situation of the earlier [provision] and [are] clearly intended as a substitute and [are] not cumulative or explanatory." *Foreman v. United States*, 26 Cl. Ct. 553, 559 (1992) (citing *Borden*, 308 U.S. 188; *United States v. Noce*, 268 U.S. 613 (1925)); *see also Tynen*, 78 U.S. at 92.

Moreover, even if the regulatory schemes of the CEA and IAA were not pervasive, (which they are), under numerous decisions of this Court, the more specific and "precisely drawn" antifraud provisions of the CEA and IAA must be held to supersede the more general antifraud provision of the FTC Act. *See Block v. North Dakota*, 461 U.S. 273, 285 (1983). "[I]n a variety of contexts," this Court has held that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. General Servs. Admin.*, 425 U.S. 820, 834 (1976) "Specific terms prevail over the general in the same or another statute which otherwise might be controlling" *D. Ginsberg & Sons v. Poplin*, 285 U.S. 204, 208 (1932). The court below gave lip service to this "specific remedy" rule (Opinion at 592 (Pet. App. at 21a)), but it plainly

disregarded the rule's requirements when rendering its decision in this case.

C. The Court Of Appeals' Decision Also Conflicts With Decisions Of Other Courts Of Appeals Holding That Where An Agency's Lack Of Authority May Be Determined As A Matter Of Law, And No Information Obtained Through The Investigation Could Possibly Affect That Conclusion, The Agency's Subpoena Or Other Compulsory Process Should Not Be Enforced.

The court below acknowledged that an agency's subpoena may not be enforced unless the agency can demonstrate that its "inquiry is within the authority of the agency . . . and the information sought is reasonably relevant." Opinion at 586 (Pet. App. at 8a) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

Petitioners contend that they are CTAs, subject to regulation by the CFTC under the CEA, or investment advisers, subject to regulation by the SEC under the IAA, and that the CEA and the IAA have either expressly or impliedly repealed any authority the FTC may otherwise have had to investigate or regulate Petitioners' conduct. In that regard, the court below acknowledged the "clear statutory authority" of the CFTC to address the allegedly fraudulent conduct of Petitioners KRC and Chart (*see* Opinion at 591 (Pet. App. at 19a)), and the CFTC's careful monitoring and repeated investigations of Petitioners' advertising practices pursuant to provisions of the CEA. *Id.* at 584 (Pet App. at 4a). It similarly acknowledged that the activities of Petitioners KRI and Warren are "within the regulatory ambit of the SEC" under the IAA. *Id.* at 584 (Pet. App. at 4a).

It follows that the *only* remaining issues are *purely legal* — whether the FTC has authority to investigate the advertising practices of CTAs that are subject to CFTC oversight under the CEA, or investment advisers that are subject to SEC oversight under the IAA. It follows, as well, that no information the FTC might obtain in the course of its investigation could possibly affect a court's consideration or disposition of these issues.

Nevertheless, the Court of Appeals held that the Petitioners' challenge to the FTC's authority is "premature" because it is not "patently clear" that the FTC "lacks the jurisdiction that it seeks to assert" over the Petitioners' advertising activities. *See* Opinion at 584-585 (Pet. App. at 3a, 6a). Thus, the ruling of the court below evades the question fairly presented for its consideration and needlessly subjects the Petitioners to the burdens, costs and inconvenience of an investigation the FTC has no authority to conduct and to no purpose whatsoever.

In similar circumstances, two other courts of appeals have held directly to the contrary.

In *United States v. Cabrini Med. Ctr.*, 639 F.2d 908 (2d Cir. 1981), the Office of Civil Rights of the Department of Health and Human Services sought to investigate the conduct of a hospital. That case, as this, turned on a question of statutory interpretation. And, as in the case at bar, the agency argued that it "should be allowed to investigate even though there may be a serious question about [the agency's] jurisdiction to investigate." *Id.* at 910. The Court of Appeals observed, however, that, "only the purely legal question of statutory jurisdiction was before the district court," and that "nothing [the agency's] intended investigation might reveal

could create jurisdiction if it does not exist on the facts before us." In sharp contrast to the decision below, but in terms equally appropriate to the case at bar, the Court of Appeals for the Second Circuit held: "*We see no point in permitting the Government to institute an investigation with its attendant inconvenience, expense, and annoyance if there is and can be no authority for undertaking it.*" *Id.* at 910 (emphasis added).

Similarly, in *Federal Trade Comm'n v. Miller*, 549 F.2d 452 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit considered whether common carriers are exempt from the FTC's power to investigate advertising practices and, if so, whether that exemption may be asserted by a carrier as a defense in a subpoena enforcement proceeding. *Id.* at 454. The Court of Appeals observed that, "Section 9 [of the FTC Act] does not authorize the issuance of subpoenas in connection with an investigation which the [FTC] is not empowered to make." *Id.* at 456. The court found, as here, that all relevant factual questions had been conceded (*id.* at 460) and that the issue before the court was a "purely legal one." *Id.* at 461. Finding in favor of the respondents, the court remanded the case with directions to deny enforcement of the FTC's subpoenas. Pertinent to the case at bar, it aptly observed that *if a party's "right to be free from FTC investigation is to have any meaning at all, it must be possible to assert it in response to the agency's attempt to enforce its subpoenas."* *Id.* at 462 (emphasis added).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND DECIDED DECEMBER 28, 2001

FEDERAL TRADE COMMISSION,

Appellee,

v.

KEN ROBERTS COMPANY, et al.,

Appellants.

No. 00-5266.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 4, 2001.

Decided Dec. 28, 2001.

Federal Trade Commission (FTC) petitioned to enforce civil investigative demands (CIDs) issued to subject of deceptive advertising investigation. The United States District Court for the District of Columbia, James Robertson, J., granted petition, and appeal was taken. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that FTC's authority to investigate allegedly deceptive advertising by seller of courses in commodities and securities investing was not so clearly preempted by either Commodity Exchange Act (CEA) or Investment Advisors Act (IAA) as to preclude enforcement of its CIDs.

Affirmed.

* * *

Appendix A

Before: EDWARDS, ROGERS, and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

The appellants — Ken Roberts Company ("KRC"), Ken Roberts Institute, Inc. ("KRI"), United States Chart Company ("Chart"), and Ted Warren Corporation ("Warren") (collectively "Ken Roberts") — sell instructional materials that purport to teach would-be investors how to make money investing in the commodities and securities markets. In an effort to determine whether Ken Roberts had engaged in deceptive advertising or selling of goods or services in violation of sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, the Federal Trade Commission ("FTC") issued civil investigative demands ("CIDs") requiring Ken Roberts to produce documents and to respond to interrogatories relating to the companies' business practices. The appellants answered some of the interrogatories, but declined to respond to most of what had been requested. Ken Roberts then filed a Petition to Quash with the FTC. The appellants claimed that, because the regulation of their advertising practices was subject to the exclusive jurisdiction of the Commodities Futures Trading Commission ("CFTC") or the Securities and Exchange Commission ("SEC"), the FTC lacked authority to investigate. The FTC denied the petition and then filed its own petition in District Court seeking an order to enforce the CIDs. On May 26, 2000, the District Court granted the FTC's petition and ordered Ken Roberts to comply with the CIDs. The appellants now seek review of that judgment.

Appendix A

Ken Roberts contends that, pursuant to the express terms of the Commodity Exchange Act ("CEA"), the CFTC has exclusive jurisdiction to regulate the disputed business practices of Ken Roberts Company and United States Chart Company. Ken Roberts claims further that, because Ken Roberts Institute and Ted Warren Corporation are subject to pervasive regulation by the SEC under the Investment Advisors Act ("IAA"), the FTC's authority to investigate these companies has been impliedly preempted. Therefore, according to Ken Roberts, because the FTC is without authority to regulate the cited advertising and promotional practices of Ken Roberts, the CIDs cannot be sustained. We disagree.

With rare exceptions (none of which applies here), a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced. Whatever the ultimate merit of Ken Roberts' preemption arguments — and we believe they have little — appellants cannot overcome the long-standing doctrine that precludes courts from entertaining challenges to the jurisdiction of administrative agencies during subpoena enforcement proceedings. Because under no reasonable reading of the CEA or the IAA does either of those statutes manifestly strip the FTC of its broad power over deceptive advertising, we affirm the District Court's decision that appellants must comply with the FTC's compulsory process.

Appendix A

I. BACKGROUND

KRC and Chart market courses in commodities trading and are therefore subject to the jurisdiction of the CFTC. KRI and Warren offer instruction in securities trading, which places them within the regulatory ambit of the SEC. These companies rely heavily on Internet advertising: their websites feature grandiose claims about potential earnings by investors and testimonials from persons who have allegedly benefitted from Ken Roberts' instructional materials.

Since 1994, the CFTC has carefully monitored the activities of KRC to determine whether the company had violated various sections of the CEA, particularly the statute's antifraud provisions, 7 U.S.C. § 6*o* (1999). In at least four separate investigations, the Commission sought to determine whether KRC's advertising claims, both in print and, more recently, on-line, can be substantiated. To this end, the CFTC repeatedly used its subpoena power to compel KRC to turn over business records and detailed documentation supporting the promotional claims that it has made. The company always has responded to CFTC subpoenas, and never has been sanctioned or forced to admit any wrongdoing. While one investigation did lead to a consent decree, pursuant to which KRC and Chart registered with the CFTC as commodity trading advisers ("CTAs"), *see* 7 U.S.C. § 1a(5), the Commission has never taken enforcement action against KRC.

In 1999, the FTC, in conjunction with the CFTC and the SEC, announced a coordinated investigation of deceptive day trading promotions. In early September 1999, the FTC formally authorized the use of compulsory process to

determine whether various on-line merchants were engaged in deceptive marketing practices. With an investigative agenda aimed at high-risk/high-yield investment activity and suspicious Internet advertising, the Commission soon focused on Ken Roberts. On September 30, 1999, the FTC issued CIDs requesting a wide variety of information through written interrogatories and documents relating to Ken Roberts' business practices. The CIDs were designed to reveal whether the companies had mislead the public in promoting their instructional courses. To this end, the Commission demanded a full accounting of the companies' sales volume, as well as evidence underlying the claims made in their testimonials and other advertising materials.

Appellants resisted complying fully with the CIDs, believing them to be duplicative of the subpoenas that had already been issued by the CFTC and beyond the FTC's power to issue. Thus, Ken Roberts responded only to some of the interrogatories and produced none of the requested documents. They then filed an administrative petition with the FTC to quash the CIDs. In that proceeding, Ken Roberts argued, as they do here, that the CEA and the IAA deprive the Commission of its jurisdiction to regulate — and therefore to investigate — deceptive advertising practices of, respectively, CTAs and investment advisers. The FTC rejected this petition, holding that the subpoenas were issued as part of a lawful investigation, one fully authorized by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.* (1997), and not foreclosed by any rival regulatory statute. *See* In re Petition of The Ken Roberts Co. et al. to Quash Civil Investigative Demands, File No. 9923259 (Feb. 25, 2000), *reprinted in* Joint Appendix ("J.A.") 72.

When Ken Roberts persisted in refusing to comply with the CIDs, the FTC petitioned the District Court to compel enforcement pursuant to 15 U.S.C. § 57b-1(e). In a brief order, the District Court granted the agency's petition to enforce. *See FTC v. Ken Roberts Co.*, Order, Misc. No. 00-204 (May 26, 2000), *reprinted in* J.A. 248. Ken Roberts now appeals.

II. DISCUSSION

Appellants ask this court to hold that the jurisdiction-conferring provisions of the CEA and the IAA preempt – the former expressly, the latter implicitly – the jurisdiction that the FTC would otherwise possess over appellants' allegedly deceptive marketing of their investor-training courses. Though the nature of our analysis obliges us to investigate these questions, we need not answer them definitively, for we have concluded that Ken Roberts' challenge is premature.

A. Jurisdictional Challenges to Agency Subpoenas

The threshold issue in this case is whether the appellants may raise their challenge to the Commission's jurisdiction now, or instead whether they are obliged to await an actual enforcement action. In upholding the judgment of the District Court, we are governed by the long-standing doctrine that administrative agencies must be given wide latitude in asserting their power to investigate by subpoena. As the Second Circuit has noted:

> [A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is

> within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party.

United States v. Construction Prods. Research, Inc., 73 F.3d 464, 470 (2d Cir.1996).

The Supreme Court first articulated this doctrine in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943). *Endicott* established that, as a general proposition, agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas. The Court therefore held that the Secretary of Labor was entitled to enforce a subpoena for payroll records issued in an effort to determine whether Endicott Johnson had run afoul of the Walsh-Healey Public Contracts Act. The District Court had scheduled a trial to determine whether Endicott was covered by the Act, but the Supreme Court rejected this approach. Rather, the Court held that, because "[t]he evidence sought by the subpoena was not *plainly incompetent or irrelevant to any lawful purpose* of the Secretary in the discharge of her duties under the Act . . . it was the duty of the District Court to order its production for the Secretary's consideration." *Id.* at 509, 63 S.Ct. at 343 (emphasis added).

Following *Endicott*, courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process. *See, e.g., United States v. Sturm, Ruger & Co.*, 84

F.3d 1, 5 (1st Cir.1996) ("We have repeatedly admonished that questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings."); *Construction Prods. Research*, 73 F.3d at 468-73 (enforcing subpoena issued by Nuclear Regulatory Commission over objection that the subject matter of the agency's investigation was reserved by law for the Department of Labor); *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir.1985) ("The initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena."); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir.1982) ("It is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute."); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C.Cir.1979) (acknowledging a concession that "an individual may not normally resist an administrative subpoena on the ground that the agency lacks regulatory jurisdiction if the subpoena is issued at the investigational stage of the proceeding").

Subpoena enforcement power is not limitless, however. In *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 369, 94 L.Ed. 401 (1950), the Court emphasized that a subpoena is proper only where "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Accordingly, "there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers." *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir.1983). Thus, a court must "assure itself that the

subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C.Cir.1981); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C.Cir.1977) (en banc) (administrative subpoenas should be enforced unless the information sought is irrelevant to "a lawful purpose of the agency"). These cases amply demonstrate that while the courts' role in subpoena enforcement may be a "strictly limited" one, it is neither minor nor ministerial. *See FTC v. Anderson*, 631 F.2d 741, 744 (D.C.Cir.1979).

In adhering to the foregoing principles, we have held that enforcement of an agency's investigatory subpoena will be denied only when there is "a patent lack of jurisdiction" in an agency to regulate or to investigate. *See CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C.Cir.1979); *see also Gov't of Territory of Guam v. Sea-Land Serv., Inc.*, 958 F.2d 1150, 1155 (D.C.Cir.1992); *Ernstthal*, 607 F.2d at 492 (declining to relax "the well-established barrier against ruling on the agency's regulatory jurisdiction in subpoena enforcement proceeding . . . where the absence of jurisdiction is not patent, and there are no allegations of agency bad faith"). As the following discussion will demonstrate, there is no "patent lack of jurisdiction" in this case.

B. Preemption of the FTC's Power to Regulate Deceptive Advertising

On its own terms, the FTC Act gives the FTC ample authority to investigate and, if deceptive practices are

uncovered, to regulate appellants' advertising practices. *See* 15 U.S.C. §§ 45(a) (allowing the Commission to prevent unfair competition and deceptive acts or practices in or affecting commerce); 52-54 (allowing the Commission to regulate and enjoin false advertising); 57b-1(c) (allowing the Commission to issue CIDs to investigate possible § 45 violations). Therefore, the FTC is entitled to have its subpoenas enforced unless some other source of law patently undermines these broad powers. Appellants contend that two federal statutes have this effect. KRC and Chart, who sell courses in commodities investing, argue that the 1974 amendments to the Commodity Exchange Act expressly preempted the FTC's jurisdiction over their activities as registered CTAs. KRI and Warren, who sell courses in securities investing, argue that the Investment Advisers Act impliedly preempts the Commission's regulatory power over their advertisements. We consider these contentions in turn, and conclude that neither has merit.

1. Appellants' Claim of Express Preemption Pursuant to the Commodity Exchange Act

Though Congress has long sought to regulate the futures market, the Commodity Futures Trading Commission is not very old. The first federal statute dealing with commodities trading, the 1921 Future Trading Act, was declared unconstitutional by the Supreme Court, *see Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922), and quickly replaced by the Grain Futures Act, which the Court upheld, *see Bd. of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1923). In 1936, this latter enactment was amended and renamed the Commodity Exchange Act.

That initial version of the CEA delegated certain regulatory responsibilities to a commission composed of the Attorney General, along with the Secretaries of Agriculture and Commerce. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 360-63, 102 S.Ct. 1825, 1830-32, 72 L.Ed.2d 182 (1982); S.REP. No. 93-1131, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5855.

It was not until 1974, however, that the CFTC as it exists today was born. After considerable deliberation, Congress enacted the Commodity Future Trading Commission Act ("CFTCA"), an extensive overhaul of the CEA that both expanded the statute's coverage and dramatically altered its enforcement scheme. *Curran*, 456 U.S. at 365-66, 102 S.Ct. at 1832-33. Most importantly, the CFTCA for the first time brought *all* commodities under federal regulation; the earlier statutes had covered only enumerated agricultural goods that in no way represented the vast array of products that were actually being traded on futures markets. *See* H.R.REP. No. 93-963, at 38 (1974). The Commission spawned by the 1974 statute was an independent regulatory agency invested with broad powers to regulate futures trading and commodities exchanges. *See* S.REP. No. 93-1131, at 2-3, 1974 U.S.C.C.A.N. at 5844-45; *CFTC v. Schor*, 478 U.S. 833, 836, 106 S.Ct. 3245, 3249, 92 L.Ed.2d 675 (1986) (describing the "sweeping authority" entrusted to the CFTC). Congress authorized the CFTC to bring an action for injunctive relief in federal district court against anyone violating the CEA or the regulations promulgated thereunder. *See* Commodity Future Trading Commission Act of 1974, Pub.L. No. 93-463, § 211, 88 Stat. 1402 (1974) (codified as amended at 7 U.S.C. § 13a-1).

Moreover, and most important to the present case, the new agency was invested with exclusive jurisdiction over certain aspects of the futures trading market. *See id.*, § 201, 88 Stat. 1389 (codified as amended at 7 U.S.C. § 2(a)(1)(A) (2001)). The aim of this provision, according to one of its chief sponsors, was to "avoid unnecessary, overlapping and duplicative regulation," especially as between the Securities and Exchange Commission and the new CFTC. 120 Cong. Rec. H34,736 (Oct. 9, 1974) (remarks of House Agriculture Committee Chairman Poage); Philip F. Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy,* 29 VAND. L. REV. 12-13; 16-17 (1976).

In determining what Congress intended when it passed § 2(a)(1)(A), we must focus on the precise text of the enacted legislation. *See Carter v. United States*, 530 U.S. 255, 271, 120 S.Ct. 2159, 2170, 147 L.Ed.2d 203 (2000) ("In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it.") (internal citations omitted). Section 2(a)(1)(A) reads as follows:

> The Commission shall have *exclusive jurisdiction . . . with respect to accounts, agreements* (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), *and transactions involving contracts of sale of a commodity for future delivery,* traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of

> this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 2(a)(1)(A) (emphasis added). Appellants (KRC and Chart) contend that this provision precludes the FTC from regulating their activities as registered CTAs, because the statute gives the CFTC "exclusive jurisdiction" over "accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery." In other words, Ken Roberts claims that the advertising and promotion of educational materials that purport to teach investors how to get rich trading futures are "transactions involving contracts of sale of a commodity for future delivery." Thus, appellants would have us construe this phrase to confer exclusive jurisdiction on the CFTC over the marketing practices of firms that sell not commodities themselves, but rather instruction in commodities trading. We find this interpretation of the Commission's exclusive jurisdiction to be far-fetched, to say the least.

Appendix A

On its face, § 2(a)(1)(A) confers exclusive jurisdiction to the CFTC over a limited, discrete set of items related to the making of futures contracts. Specifically, these are (1) "accounts . . . involving contracts of sale of a commodity for future delivery," (2) "agreements" involving the same, (3) "transactions" involving the same, and (4) "transactions subject to regulation by the Commission pursuant to section 23 of this title" (dealing with so-called "margin" or "leverage" contracts). It is certainly not obvious that the advertising at issue in this case fits in any of these categories. "Transactions," broadly construed, is perhaps appellants' best bet. Yet, it strains common parlance to construe "transactions involving contracts of sale of a commodity" to include the marketing practices of a firm that does not buy and sell futures, but rather merely instructs others how to do so. As it is generally understood, the word "transactions" conveys a reciprocity, a mutual exchange, which seems absent from the allegedly deceptive advertising materials that the FTC seeks to investigate in this case. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2425-26 (defining "transaction" as, *inter alia*, "a business deal" and "a communicative action or activity involving two or more parties or two things reciprocally affecting or influencing each other").

Appellants seek to overcome this impression by pointing to a separate provision in the statute that uses "transactions" in a different, and more expansive, way. As part of the 1974 overhaul of the CEA, Congress made a set of legislative findings in which it announced that the activities of CTAs, including "their advice, counsel, publications, writings, analyses, and reports[,] customarily relate to and their

operations are directed toward and cause the purchase of commodities for future delivery. . . ." 7 U.S.C. § 6*l*. This finding then goes on to say that "the foregoing *transactions* occur in such volume as to affect substantially *transactions* on contract markets." *Id.* (emphases added). Ken Roberts contends that because Congress used the term "transactions" to mean advice, counsel, publications, etc., in § 6*l*, we must read that term the same way in the exclusive jurisdiction provision in § 2(a)(1)(A). "The rule of *in pari materia* – like any canon of statutory construction – is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972). In this case, however, appellants' attempted reliance on the *in pari materia* canon of construction is entirely unconvincing, because it proves far too much.

Appellants ignore the fact that § 6*l* uses the word "transactions" twice in the same sentence to mean two different things. The second appearance of the word – "transactions on contract markets" – cannot reasonably embrace the broad set of activities contemplated by the first. Instead, the second reference to "transactions" in § 6*l* is best understood to refer to the actual trading of futures contracts. As such, the *in pari materia* rule is of little help to appellants, for it provides no guidance as to which construction of "transactions" the court should import from § 6*l* into § 2(a)(1)(A).

By contrast, when "transactions" is examined in the context of § 2(a)(1)(A), it seems most naturally read as

encompassing, like its neighbors, a set of arrangements directly related to the actual sale of commodities futures. In statutory interpretation, after all, words are generally known by the company they keep. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 1069, 131 L.Ed.2d 1 (1995) (describing and applying the *noscitur a sociis* canon). And here, because "accounts" and "agreements" seem so plainly to denote categories of financial arrangements through which the trading of commodities occurs or is facilitated, it makes sense to construe "transactions" in the same way.

These terms were added to the bill that became the CFTCA in order to extend the Commission's exclusive jurisdiction over so-called "discretionary accounts," commodity options, and other trading agreements described in the statute. *See* Johnson, at 14 & n.44; H.R. CONF. REP. No. 93-1383 (1974), *reprinted in* 1974 U.S.C.C.A.N 5894, 5897 ("[T]he Commission's [exclusive] jurisdiction . . . includes the regulation of commodity accounts, commodity trading agreements, and commodity options."). *Noscitur a sociis* instructs us to construe "transactions" in a similar light, as denoting a set of actions closely linked to the actual trading of commodities. Under this reading, all of the categories delineated in § 2(a)(1)(A) describe business deals that involve the buying and selling of futures, which comports with Congress' goal of conferring the CFTC with sole regulatory authority over "futures contract *markets* or other *exchanges*," H.R. CONF. REP. No. 93-1383, 1974 U.S.C.C.A.N. at 5897 (emphasis added), or "over options *trading* in commodities (but not in securities)," S.REP. No. 93-1131, at 31, 1974 U.S.C.C.A.N. at 5870 (emphasis added).

A second problem with the broad definition of "transactions" proposed by the appellants is that it produces potentially absurd results. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). The first use of that word in § 6*l* sweeps more broadly than just the "advice," "counsel," and "publications" of CTAs; indeed, it includes their very "operations" as well. And an interpretation of § 2(a)(1)(A) under which the CFTC was given exclusive authority over all CTA "*operations* involving contracts of sale of a commodity," especially when coupled with the expansive reading of "involving" urged by appellants, would seem to preclude virtually any other government regulation affecting the futures trading industry. It could suggest, for example, that government agencies regulating employment relations or safety and health would be powerless to take action against CTAs. We do not believe that this is what Congress intended when it enacted § 2(a)(1)(A).

As noted above, the statute's legislative history repeatedly emphasizes that the CFTC's jurisdiction was "to be exclusive with regard to the trading of futures *on organized contract markets.*" S.REP. No. 93-1131, at 23, 1974 U.S.C.C.A.N. at 5863 (emphasis added). Indeed, as the Seventh Circuit has recognized, the goal of the CFTCA was to bring the futures markets "under a uniform set of regulations" and that "[o]nly in the context of market regulation does the need for uniform legal rules apply." *Am. Agric. Movement, Inc. v. Bd. of Trade of City of Chicago*,

977 F.2d 1147, 1155-57 (7th Cir.1992) (relying on this legislative purpose to hold that state common law actions against commodities brokers are preempted only when they would "directly affect trading on or the operation of a futures market"). It is true that the CFTC was created to regulate all commodities and commodities *trading, see Point Landing, Inc. v. Omni Capital Int'l Ltd.*, 795 F.2d 415, 420-21 (5th Cir.1986); it does not follow from this, however, that Congress intended to preempt the activities of all other federal agencies in their regulatory realms. "Preemption of the regulation of the market does not also mean preemption of all law that might involve participants in the market." *Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc.*, 465 F.Supp. 585, 592 (D.La.1979). Appellants' position makes no sense insofar as it suggests that the scope of the CFTC's exclusive jurisdiction is *broader* than the scope of the agency's authority to regulate under the CEA.

We will give appellants the benefit of the doubt and assume that what they really mean to argue is that the limits of the exclusive jurisdiction provision in § 2(a)(1)(A) is coterminous with the limits of the CFTC's regulatory authority under the CEA. In other words, Ken Roberts appears to assume that, at a minimum, whatever the Commission may regulate, it regulates exclusively. This is a specious contention. Both the text and purpose of the statute contemplate a regime in which other agencies may share power with the CFTC over activities that lie outside the scope of § 2(a)(1)(A), but that still involve the activities of commodities advisers or that implicate other provisions of the CEA. Indeed, the inclusion of the so-called "regulatory savings clauses," § 2(a)(1)(A)(I)-(II), makes clear that other

agencies, such as the FTC, retain their jurisdiction over all matters beyond the confines of "accounts, agreements, and transactions involving contracts of sale of a commodity for future delivery." *Cf. Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 550 (7th Cir.1989) (noting that § 2 "carries no implicit preemptive force").

The imperfect overlap between § 2(a)(1)(A) and the rest of the CEA is neatly demonstrated by the statute's antifraud provision, on which the CFTC's own power to investigate appellants, which it has done since 1994, presumably rests. 7 U.S.C. § 6*o* makes it unlawful, *inter alia,* for a CTA "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant." Thus, while the CFTC has the clear statutory authority to regulate a CTA's deceitful "practices" – and "practices," far more so than "transactions," comfortably describes the advertising at issue in this case – there is no reason to think that this authority is exclusive. A "practice" or "course of business" is quite plainly not a "transaction" – either in life or in this statutory provision. (Nor for that matter is it an "account" or "agreement.") As such, a comparison of the texts of § 6*o* and § 2(a)(1)(A) appears to indicate that the CFTC's authority over CTAs is broader than the substantive scope of its exclusive jurisdiction to regulate futures and futures markets.

In sum, then, both context (textual and historical) and common sense support a reading of the exclusive jurisdiction provision in which the phrase "accounts, agreements, and transactions involving contracts of sale of a commodity" does not cover the marketing of investor-education courses that

leads only tangentially to the actual purchase of futures. While the FTC's investigation may implicate the CEA, we believe that it falls outside of the range of subjects described by § 2(a)(1)(A). At the very least, the foregoing discussion illustrates that there is no "patent lack of jurisdiction" in the FTC to investigate or regulate in this case. Appellants' preemption arguments are simply not compelling enough to overcome this court's long-standing chariness about entertaining jurisdictional challenges to administrative subpoenas. Accordingly, we hold that the District Court's properly allowed the FTC to proceed with its investigation of KRC and Chart.

2. Implied Preemption Under the Investment Advisers Act

KRI and Warren, whose businesses involve securities rather than commodities, assert that the comprehensive scope of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* (1997), preempts the FTC's jurisdiction to regulate the fraudulent practices of "investment advisers" such as themselves. Even if there were something to this claim, which we doubt, it does not come close to establishing that the FTC is *manifestly* without jurisdiction in regard to the subject matter of its subpoenas.

In contrast to the CEA, the IAA contains no express exclusive jurisdiction provision. As such, the only vehicle by which the FTC's otherwise-plenary power to investigate and uproot unfair or deceptive trade practices could be disturbed is through the doctrine of implied repeal. We have recognized that, where intended by Congress, " 'a precisely

drawn, detailed statute pre-empts more general remedies.' " *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367 (D.C.Cir.1988) (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834, 96 S.Ct. 1961, 1968, 48 L.Ed.2d 402 (1976)). This can occur either where the two enactments are in "irreconcilable conflict" or where the latter was clearly meant to serve as a substitute for the former. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936); *cf. Demby v. Schweiker*, 671 F.2d 507, 513 (D.C.Cir.1981) (Wright, J., concurring) (describing the two kinds of implied repeals). Appellants contend that the antifraud provision of the IAA, which prohibit investment advisers from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," 15 U.S.C. § 80b-6(2), stands as just such a specific remedy that displaces the more general coverage of the FTC Act.

To prevail at this stage of the litigation, KRI and Warren must establish not merely that the IAA, properly construed, deprives the FTC of jurisdiction, but that it does so patently. However, the entire structure of the implied preemption inquiry militates against such a finding in this case. Both the Supreme Court and this court have observed that implied repeals of one statute (or a provision in one statute) by another are "not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976) (quoting *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976)); *Galliano*, 836 F.2d at 1369 ("strongly disfavored"). They are recognized only where the intention of the legislature is "clear and manifest." *Posadas*, 296 U.S. at 503, 56 S.Ct. at 351;

Morton v. Mancari, 417 U.S. 535, 549-50, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974) (some "affirmative showing" of intent to repeal is necessary).

Because we live in "an age of overlapping and concurring regulatory jurisdiction," *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192 (D.C.Cir.1986), a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may. *E.g., Galliano*, 836 F.2d at 1369-70 (relying on the First Amendment and the canon of constitutional doubt in holding that the Federal Election Campaign Act partially preempted the postal fraud prescriptions of 39 U.S.C. § 3005); *see also Pennsylvania v. ICC*, 561 F.2d 278, 292 (D.C.Cir.1977) ("It is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect."). In this case, while it may be true that the IAA and the FTC Act employ different verbal formulae to describe their antifraud standards, it hardly follows that they therefore impose conflicting or incompatible obligations. *See Radzanower*, 426 U.S. at 155, 96 S.Ct. at 1992-93 (repeals only implied to the extent necessary to make the later enacted law work). Undoubtedly, entities in appellants' position can – and of course should – refrain from engaging in both "unfair and deceptive acts or practices" *and* "any transaction, practice, or course of business which operates as a fraud or deceit upon a client or prospective client." The proscriptions of the IAA are not diminished or confused merely because investment advisers must also avoid that which the FTC Act proscribes. And, because these statutes are "capable of co-existence," it becomes the *duty*

of this court "to regard each as effective" – at least absent clear congressional intent to the contrary. *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483.

Appellants can point to nothing in the background or history of the IAA that demonstrates (or even hints at) a congressional intent to preempt the antifraud jurisdiction of the FTC over those covered by the new statute. Nor does the subsequent case law interpreting these statutes contain such declarations. The closest case is perhaps *Spinner Corp. v. Princeville Develop. Corp.*, 849 F.2d 388, 392 n. 4 (9th Cir.1988), which notes that the "FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities, presumably because such transactions fall under the comprehensive regulatory umbrella of the Securities and Exchange Commission." Based on this observation, the court held that Hawaii's "baby FTC Act," which was patterned after the federal statute, did not regulate the purchase and sale of securities, despite language that would seem to include such activity. *See id.* Even if we agreed with the Ninth Circuit's dubious reasoning – which implies that because a power has not been exercised, the power does not exist – we simply do not think that such indicia of intent are enough to allow us to quash the FTC's subpoenas.

In sum, then, whatever the ultimate force of arguments about the structure of the IAA or the FTC's historical practice regarding securities transactions, neither of these are sufficiently forceful to deprive the Commission of its general prerogative to determine, at least in the first instance, the scope of its own investigatory authority.

Appendix A

III. CONCLUSION

For the reasons given above, we hold that the FTC is entitled to enforce its CIDs against all four appellants in this case. Neither the Commodity Exchange Act nor the Investment Advisers Act evince an unambiguous intent to deprive the FTC of its otherwise applicable authority to investigate possibly deceptive advertising and marketing practices merely because those practices relate to either the commodities or the securities business. Accordingly, the decision of the District Court is affirmed.

So ordered.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MAY 26, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 00-204

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.,
Washington, D.C. 20580,

Petitioner,

vs.

KEN ROBERTS COMPANY, and
THE KEN ROBERTS INSTITUTE, INC.
333 S.W. 5th Street
Grants Pass, Oregon 97526,

Respondents.

ORDER

Petitioner, the Federal Trade Commission, has invoked the aid of this Court, pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, to require respondents, Ken Roberts Company and The Ken Roberts Institute, Inc., to comply with a Civil Investigative Demand for Written Interrogatories and Report, which was issued to them on September 30, 1999, and with a Civil Investigative Demand for Documentary Material, which was also issued

to them on September 30, 1999. After considering the papers of record and the arguments of the parties, the Court has determined that the inquiry is within the authority and jurisdiction of the agency, that the requests made by the Civil Investigative Demands issued to respondent on September 30, 1999, are reasonably relevant to the inquiry, and that responding to the interrogatories and producing the documents is not unduly burdensome. Because the Court is of the opinion that the relief sought by the Commission should be granted, it is hereby:

ORDERED that the respondents be, and hereby are, commanded to comply, in full, with the Civil Investigative Demand for Documentary Material, and the Civil Investigative Demand for Written Interrogatories and Report, both of which were issued to respondents on September 30, 1999; in the manner designated in those Civil Investigative Demands, within ten (10) days of issuance of this Order or at such later date as may be designated by the Commission.
SO ORDERED:

Date: May 26, 2000

s/ [Illegible]
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED MARCH 1, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5266

September Term, 2001
00ms00204

Filed On: March 1, 2002

Federal Trade Commission,

Appellee

v.

Ken Roberts Company, et al.,

Appellants

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appendix C

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX D — RELEVANT STATUTES

7 U.S.C. § 2(a)(1)(A)

§ 2. Jurisdiction of Commission; liability of principal for act of agent; Commodity Futures Trading Commission; transaction in interstate commerce

(a) Jurisdiction of Commodity Futures Trading Commission; Commodity Futures Trading Commission

(1) Jurisdiction of Commission

(A) In general

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or

limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 6*l*

§ 6*l*. Commodity trading advisors and commodity pool operators; Congressional finding

It is hereby found that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, solicitations, subscriptions, agreements, and other arrangements with clients take place and are negotiated and performed by the use of the mails and other means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to and their operations are directed toward and

cause the purchase and sale of commodities for future delivery on or subject to the rules of contract markets or derivatives transaction execution facilities; and

(3) the foregoing transactions occur in such volume as to affect substantially transactions on contract markets or derivatives transaction execution facilities.

7 U.S.C. § 6m(1)

§ 6m. Use of mails or other means or instrumentalities of interstate commerce by commodity trading advisors and commodity pool operators; relation to other law

(1) It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: Provided, That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor. The provisions of this section shall not apply to any commodity trading advisor who is a (1) dealer, processor, broker, or seller in cash

market transactions of any commodity specifically set forth in section 2 of this title prior to October 23, 1974 (or products thereof) or (2) non-profit, voluntary membership, general farm organization, who provides advice on the sale or purchase of any commodity specifically set forth in section 2 of this title prior to October 23, 1974; if the advice by the person described in clause (1) or (2) of this sentence as a commodity trading advisor is solely incidental to the conduct of that person's business: Provided, That such person shall be subject to proceedings under section 18 of this title.

7 U.S.C. §§ 6n(1) & 6n(3)(A)

§ 6n. Registration of commodity trading advisors and commodity pool operators; application; expiration and renewal; record keeping and reports; disclosure; statements of account

(1) Any commodity trading advisor or commodity pool operator, or any person who contemplates becoming a commodity trading advisor or commodity pool operator, may register under this chapter by filing an application with the Commission. Such application shall contain such information, in such form and detail, as the Commission may, by rules and regulations, prescribe as necessary or appropriate in the public interest, including the following:

(A) the name and form of organization, including capital structure, under which the

applicant engages or intends to engage in business; the name of the State under the laws of which he is organized; the location of his principal business office and branch offices, if any; the names and addresses of all partners, officers, directors, and persons performing similar functions or, if the applicant be an individual, of such individual; and the number of employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of the applicant and of his partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of the applicant, including the manner of giving advice and rendering of analyses or reports;

(D) the nature and scope of the authority of the applicant with respect to clients' funds and accounts;

(E) the basis upon which the applicant is or will be compensated; and

(F) such other information as the Commission may require to determine whether the applicant is qualified for registration.

* * *

Appendix D

(3)(A) Every commodity trading advisor and commodity pool operator registered under this chapter shall maintain books and records and file such reports in such form and manner as may be prescribed by the Commission. All such books and records shall be kept for a period of at least three years, or longer if the Commission so directs, and shall be open to inspection by any representative of the Commission or the Department of Justice. Upon the request of the Commission, a registered commodity trading advisor or commodity pool operator shall furnish the name and address of each client, subscriber, or participant, and submit samples or copies of all reports, letters, circulars, memorandums, publications, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers, or participants.

7 U.S.C. § 6*o*

§ 6*o* Fraud and misrepresentation by commodity trading advisors, commodity pool operators, and associated persons

(1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly —

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

(2) It shall be unlawful for any commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator registered under this chapter to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the United States or any agency or officer thereof. This section shall not be construed to prohibit a statement that a person is registered under this chapter as a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

Appendix D

7 U.S.C. § 9

§ 9. Exclusion of persons from privilege of "registered entities"; procedure for exclusion; review by court of appeals

If the Commission has reason to believe that any person (other than a registered entity) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any registered entity, and directing that all registered entities refuse all privileges to such person, until further notice of the Commission,

and to show cause why the registration of such person, if registered with the Commission in any capacity, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission, or before an Administrative Law Judge designated by the Commission, which Administrative Law Judge shall cause all evidence to be reduced to writing and forthwith transmit the same to the Commission. Upon evidence received, the Commission may (1) prohibit such person from trading on or subject to the rules of any registered entity and require all registered entities to refuse such person all privileges thereon for such period as may be specified in the order, (2) if such person is registered with the Commission in any capacity, suspend, for a period not to exceed six months, or revoke, the registration of such person, (3) assess such person a civil penalty of not more than the higher of $100,000 or triple the monetary gain to such person for each such violation[1] and (4) require restitution to customers of damages proximately caused by violations of such persons. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said registered entities. After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United

1. So in original. Probably should be followed by a comma.

States court of appeals of the circuit in which the petitioner is doing business, or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located, a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

15 U.S.C. §§ 45(a)(1) & 45(m)(1)(A)

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

* * *

Appendix D

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

Appendix D

15 U.S.C. § 80b-6

§ 80b-6. Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or

manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-9(e)(2)

§ 80b-9. Enforcement of subchapter

(e) Money penalties in civil actions

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such

defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if —

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

FILED

AUG 2 2002

No. 01-1772

In the Supreme Court of the United States

KEN ROBERTS COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Trade Commission was authorized to issue administrative subpoenas to investigate petitioners' marketing of instructional materials that purport to advise consumers how to make money through commodities and securities trading.

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v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 276 F.3d 583. The decision of the district court (Pet. App. 25a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2001. A petition for rehearing was denied on March 1, 2002 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on May 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Ken Roberts Co. and United States Chart Co. advertise and sell books, videos, and

cassettes that purport to advise consumers how to get rich buying and selling commodity futures. Petitioners Ken Roberts Institute, Inc., and the Ted Warren Corp. sell similar materials that advise consumers about securities trading. The internet websites through which petitioners market their materials include such claims as:

> The only thing you need to become wealthy in the Stock Market is a price chart . . . It's the same tool you can use to make your own personal fortune. To see $1,000 turn into $2,000. Then $2,000 into $5,000. And $5,000 into $10,000.
>
> Ken Roberts consistently makes profits of 200% . . . 400% . . . even 1000% and up. . . .
>
> Since my technique was rated #1 in America two years in a row—*the least amount of real money into the most*—by an independent consumer rating service, obviously it's something very different from what most others do.

C.A. App. A10.

On September 7, 1999, the Federal Trade Commission (FTC) approved a Resolution Directing Use of Compulsory Process in Non-Public Investigation of Internet Advertisers, Sellers, and Promoters. C.A. App. A13. The resolution authorized the use of compulsory process to determine whether internet advertisers, sellers, and promoters may be violating Sections 5 or 12 of the FTC Act, 15 U.S.C. 45, 52, by deceptively marketing goods or services on the internet. The investigation is also intended to determine whether FTC action to obtain consumer redress would be in the public interest. C.A. App. A13.

On September 30, 1999, the FTC issued two Civil Investigative Demands (CIDs) as part of its investigation into petitioners' marketing practices. C.A. App. A14-A32. Those administrative subpoenas sought, among other things, copies of petitioners' advertising, any substantiation for the claims made in the advertising, and information regarding any individual who had given a testimonial used in the advertising. See *ibid.* Petitioners failed to provide a complete response to the CIDs. See *id.* at A11. Instead, they filed with the FTC an administrative petition to quash both CIDs. *Id.* at A33-A71. They argued that the FTC had no jurisdiction for its investigation because the Ken Roberts Co. and the United States Chart Co. are commodity trading advisers, subject to the exclusive jurisdiction of the Commodity Futures Trading Commission (CFTC), and the Ken Roberts Institute and the Ted Warren Co. are unregistered investment advisers, subject to the exclusive jurisdiction of the Securities and Exchange Commission (SEC). See *id.* at A35.

The FTC denied the petition to quash. C.A. App. A72-A81. The FTC concluded that, under the Commodity Exchange Act (CEA), the CFTC's area of exclusive jurisdiction extends only to the regulation of the futures market itself. Accordingly, the CEA does not preclude enforcement of laws of general application, such as the FTC Act, with respect to petitioners' marketing of instructional materials. *Id.* at A75-A77. The FTC also rejected petitioners' argument that the CEA impliedly repeals or preempts the FTC's authority to investigate petitioners' marketing of instructional materials. *Id.* at A77-A80. Finally, the FTC held that, even if petitioners Ken Roberts Institute and Ted Warren Co. are "investment advisers," subject to the jurisdiction of the SEC, that jurisdiction is not exclu-

sive. *Id.* at A80-A81. The FTC ordered petitioners to comply in full with the CIDs. *Id.* at A81. Petitioners refused. *Id.* at A12.

2. The FTC then petitioned the United States District Court for the District of Columbia to enforce the two CIDs. C.A. App. A4-A8. In opposition, petitioners again argued that the CEA expressly or impliedly repeals the FTC's authority to investigate those aspects of petitioners' business that involve the marketing of materials related to profiting through transactions in commodity futures, and that the Investment Advisers Act of 1940 (IAA), 15 U.S.C. 80b-1 *et seq.*, precludes the FTC from investigating the marketing of materials that relate to stock trading. C.A. App. A144-A184.

After a hearing, the district court concluded that it was "satisfied that the [FTC's] inquiry is within the authority and jurisdiction of the agency, that the requests made by the CIDs issued to [petitioners] are reasonably relevant to the FTC inquiry * * *, and that responding to the interrogatories and producing the documents is not unduly burdensome." C.A. App. A279. The court therefore ordered petitioners to comply in full with the CIDs. Pet. App. 25a-26a.

3. The court of appeals affirmed. Pet. App. 1a-24a. Citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), and the decisions of courts of appeals, the court observed that courts must give administrative agencies wide latitude in asserting their power to investigate by subpoena. Pet. App. 6a-9a. Therefore, the court noted, "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate." *Id.* at 9a (quoting *CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C. Cir. 1979)).

Based on a detailed analysis of the relevant statutory provisions, the court held that there is no "patent lack of jurisdiction" in this case. *Ibid.*

The court first reviewed the FTC Act and concluded that there is ample authority in the Act for the FTC's investigation. Pet. App. 9a-10a (citing 15 U.S.C. 45(a), 52-54, 57b-1(c)). Therefore, the court concluded, "the FTC is entitled to have its subpoenas enforced unless some other source of law patently undermines these broad powers." *Id.* at 10a.

The court next addressed petitioners' contention that the CEA preempts the FTC's authority over the Ken Roberts Co. and the United States Chart Co. because the CEA gives the CFTC exclusive jurisdiction over the activities of those companies. Pet. App. 10a-20a. The court recognized that the CEA, 7 U.S.C. 2(a)(1)(A), gives the CFTC exclusive jurisdiction over the regulation of commodities and commodities trading markets. Pet. App. 12a-18a. The court concluded, however, that the CEA contemplates "a regime in which other agencies may share power with the CFTC over activities that lie outside the scope of § 2(a)(1)(A)" but within other jurisdictional authority of the CFTC. *Id.* at 18a. The court determined that the marketing of investor-education courses by commodities trading advisors falls within that area of overlapping jurisdiction. *Id.* at 18a-20a. Therefore, the court held that "there is no 'patent lack of jurisdiction' in the FTC to investigate" petitioners Ken Roberts Co. and United States Chart Co. *Id.* at 20a.

The court then addressed the argument of petitioners Ken Roberts Institute and Ted Warren Corp. that the IAA repeals by implication the FTC's jurisdiction "to regulate the fraudulent practices of 'investment advisors.'" Pet. App. 20a. The court first reviewed this

Court's precedent that establishes that repeals by implication are "not favored," *id.* at 21a (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting in turn *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976))). The court recognized that "the IAA and the FTC Act employ different verbal formulae to describe their antifraud standards," but the court concluded that the two standards do not impose "conflicting or incompatible obligations." Pet. App. 22a. Because the FTC Act and the IAA are "capable of co-existence," the court held that it is "the *duty* of this court 'to regard each as effective'" absent clear congressional intent to the contrary. *Id.* at 22a-23a (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). The court noted that petitioners "point to nothing in the background or history of the IAA that demonstrates (or even hints at) a congressional intent to preempt the antifraud jurisdiction of the FTC over those covered by the" IAA. *Id.* at 23a. The court therefore held that petitioners had not presented any argument "sufficiently forceful to deprive the Commission of its general prerogative to determine, at least in the first instance, the scope of its own investigatory authority." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, this Court's review is not warranted.

1. Petitioners incorrectly contend (Pet. 23) that the court of appeals evaded their challenge to the FTC's jurisdiction. Rather, the court determined that the FTC had sufficient authority to obtain compliance with the two CIDs because petitioners had not demon-

strated a "patent lack of jurisdiction" in the FTC to conduct its investigation. Pet. App. 9a (citing *CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C. Cir. 1979)). The court thus addressed the only jurisdictional issue that was properly before it. See *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (judicial review is limited to determining whether agency subpoena is "plainly incompetent or irrelevant to any lawful purpose"). Should the FTC's investigation of petitioners result in a complaint challenging any aspect of their conduct, petitioners remain free to raise a jurisdictional challenge to the complaint, or to any order that might ensue.

Contrary to petitioners' contentions (Pet. 24-25), neither *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981), nor *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), conflicts with the court's holding here that the FTC had authority to issue the CIDs because there was no "patent lack of jurisdiction." In both of those cases, the courts concluded that the relevant statutes clearly and specifically precluded the investigations at issue. See *Cabrini Med. Ctr.*, 639 F.2d at 910 (concluding that "there is and can be no authority for" investigating the medical center based on its receipt of Medicare and Medicaid because the statute "make[s] it clear that the federal agencies are to concern themselves with investigation and enforcement only where the 'primary objective of the Federal financial assistance is to provide employment'"); *Miller*, 549 F.2d at 456-457, 460 (stating that "the words of the Act plainly exempt from the agency's investigatory jurisdiction any corporation holding the status of a common carrier regulated by the ICC" and concluding that the subpoenaed common carrier "has a clear right, conferred upon it by statute, to be free from FTC investigation").

Neither the CEA nor the IAA, nor the FTC Act itself, contains any provision limiting the FTC's authority to conduct the investigation at issue here.

2. Petitioners also err in contending (Pet. 4-13) that this Court's review is warranted to determine whether the FTC's jurisdiction to regulate their marketing practices is displaced by the exclusive jurisdiction provision of the CEA, 7 U.S.C. 2(a)(1)(A). As an initial matter, that question is not squarely presented by this case. As discussed above, because this case is a subpoena enforcement proceeding, the court of appeals did not definitively resolve that question but held only that petitioners' preemption claim was "not compelling enough" to establish a "'patent lack of jurisdiction' in the FTC to investigate or regulate in this case." Pet. App. 20a.

In any event, the court of appeals' tentative conclusion that petitioners' marketing activities do not fall within the CEA's exclusive jurisdiction provision was correct. That provision states that:

> The [CFTC] shall have exclusive jurisdiction * * * with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated * * * pursuant to [7 U.S.C. 7] or any other board of trade, exchange, or market, and transactions subject to regulation by the [CFTC] pursuant to [7 U.S.C. 23].

7 U.S.C. 2(a)(1)(A). Petitioners argue (Pet. 10-13) that their sales of instructional materials constitute "trans-

actions involving contracts of sale of a commodity." But, as the court of appeals noted, "it strains common parlance to construe 'transactions involving contracts of sale of a commodity' to include the marketing practices of a firm that does not buy and sell futures, but rather merely instructs others how to do so." Pet. App. 14a.

Nor are petitioners assisted by the provision of the CEA relating to commodity trading advisors, 7 U.S.C. 6*l*(3), which uses the word "transactions" twice in the same sentence to mean two different things. See Pet. 7-8. As the court of appeals explained (Pet. App. 15a), the second reference to "transactions" in Section 6*l*(3) clearly does not encompass petitioners' marketing activities. Thus, the court of appeals correctly interpreted the term "transactions" as used in 7 U.S.C. 2(a)(1)(A) to include "a set of arrangements directly related to the actual sale of commodities futures" and to exclude the marketing of materials purporting to provide investment advice. Pet. App. 16a.[1]

The court of appeals' decision does not conflict with any of the cases cited by petitioners (Pet. 10-11), because none of those cases involves either a challenge to the enforcement of an administrative subpoena or the marketing and sale of instructional materials. Instead, all those cases concern regulation of the actual sale of options or futures contracts or securities. See

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[1] Petitioners incorrectly contend (Pet. 6-9) that the court of appeals disregarded Congress's finding that advice on investing in commodities and futures contracts "affect[s] substantially transactions on contract markets." 7 U.S.C. 6*l*(3). Contrary to that contention, there is no inconsistency between Congress's finding that sales of investment materials "*affect substantially* transactions on contract markets" (emphasis added) and the court of appeals' conclusion that sales of investment materials do not *constitute* "transactions involving" commodity futures contracts.

Chicago Mercantile Exch. v. *SEC*, 883 F.2d 537 (7th Cir. 1989), cert. denied, 496 U.S. 936 (1990) (trading of futures contracts); *Board of Trade* v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982) (trading in options on mortgage-backed certificates); *SEC* v. *American Commodity Exch., Inc.*, 546 F.2d 1361 (10th Cir. 1976) (regulation of fictitious commodity options enterprise); *International Trading, Ltd.* v. *Bell*, 556 S.W.2d 420 (Ark. 1977), cert. denied, 436 U.S. 956 (1978) (deceptive sale of commodity options contracts); *Clayton Brokerage Co.* v. *Mouer*, 531 S.W.2d 805 (Tex. 1975) (sale of commodity options contracts); *Minnesota* v. *Coin Wholesalers, Inc.*, 250 N.W.2d 583 (Minn. 1976) (sale of silver coins on margin). No court has ever held that the CEA's exclusive jurisdiction provision deprives the FTC of authority to investigate the marketing practices of an entity that sells materials purporting to teach consumers how to get rich trading commodity futures.

3. Petitioners also incorrectly contend (Pet. 14-23) that this Court's review is warranted to determine whether the CEA or the IAA impliedly repeals the FTC's jurisdiction over petitioners' marketing activities. Like the question whether the CEA expressly deprives the FTC of jurisdiction, those questions are not squarely presented here. As petitioners themselves point out (Pet. 18), the court of appeals did not address whether the CEA impliedly repeals the FTC's jurisdiction, and this Court does not ordinarily address questions that were not passed on below. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). As for whether the IAA impliedly repeals the FTC's jurisdiction, the court of appeals also did not conclusively resolve that question. Because this case is a subpoena enforcement proceeding, the court of

appeals held only that petitioners' arguments are not "sufficiently forceful to deprive the Commission of its general prerogative to determine, at least in the first instance, the scope of its own investigatory authority." Pet. App. 23a.

In any event, neither the CEA nor the IAA impliedly repeals the FTC's authority under the FTC Act to regulate petitioners' marketing practices. This Court has repeatedly made clear that "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective," *Radzanower* v. *Touche Ross & Co.*, 426 U.S. at 155 (quoting *Morton* v. *Mancari*, 417 U.S. at 551). Thus, although repeal by implication may occur when there is a "clear repugnancy" between two statutes, *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 190 (1978), the test employed in identifying such a conflict is extremely rigorous and has rarely been deemed satisfied. See, *e.g.*, *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976). Moreover, this Court has stressed that repeals by implication are not favored and will only be found where congressional intent to effect such a repeal is "clear and manifest." *Radzanower*, 426 U.S. at 154.

Petitioners fail to identify any irreconcilable conflict between the CEA and the FTC Act. See Pet. 14-19. The CEA prohibits any commodity trading advisor from "employ[ing] any device, scheme, or artifice to defraud any client or participant or prospective client or participant," 7 U.S.C. 6*o*(1)(A), or from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant," 7 U.S.C. 6*o*(1)(B). The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Petitioners claim (Pet. 15) that there is an

irreconcilable conflict because only the FTC Act prohibits "unfair" acts or practices. But there is no clear repugnancy because the CEA does not mandate that petitioners engage in any unfair act or practice that the FTC Act prohibits. Thus, as the court of appeals observed, petitioners "can—and of course should" refrain from practices prohibited by either statute. Pet. App. 22a.

Similarly, there is no clear repugnancy between the IAA and the FTC Act. The IAA contains prohibitions identical to those in the CEA and also prohibits "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. 80b-6(4). Just like the CEA, nothing in the IAA commands petitioners to engage in unfair practices prohibited by the FTC Act. Thus, the IAA's antifraud provisions are not in conflict with the FTC Act.[2]

Nor have petitioners shown any evidence that Congress intended the antifraud provisions of the CEA or the IAA to displace the FTC's authority to investigate marketing practices of the kind in which petitioners engage. As explained above, Congress intended the CEA to have only a limited exclusive effect. That effect is expressed in the CEA's exclusive jurisdiction provision, 7 U.S.C. 2(a)(1)(A), and is limited to regulations directly related to the actual sale of commodity

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[2] In that respect, this case differs from *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), on which petitioners rely (Pet. 16). In *Gordon*, this Court found that there was an irreconcilable conflict because the two statutory schemes at issue were likely to subject the stock exchange to conflicting standards, so that complying with one statute would put the stock exchange in violation of the other. See 422 U.S. at 689 (noting that "the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC").

futures on organized contract markets. Regarding the IAA, petitioners' only argument is that, because Congress included antifraud provisions in the IAA, Congress must have intended the IAA to displace the FTC's authority. See Pet. 19. But the inclusion of antifraud provisions in the IAA suggests no such thing. As this Court has recognized, more than one agency may simultaneously address the same issues and proceed against the same parties. See, *e.g.*, *United States* v. *Radio Corp. of America*, 358 U.S. 334, 343-344 (1959); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 631-632 (1953); *FTC* v. *Cement Institute*, 333 U.S. 683, 694 (1948).

Finally, there is no merit to petitioners' contention (Pet. 20-23) that the CEA and IAA displace the FTC Act because they are either more comprehensive or more specific. A later and more comprehensive statute will displace an earlier one only if it can "be said * * * that 'the later act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Radzanower*, 426 U.S. at 157 (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither the CEA nor the IAA covers the whole subject of the FTC Act because, as petitioners recognize (Pet. 15), neither prohibits the sorts of "unfair" practices specifically proscribed by the FTC Act.[3]

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[3] Thus, contrary to petitioners' contention (Pet. 16), *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88 (1870), does not provide them any assistance. In that case, this Court held that a later criminal statute that embraced all of the provisions of a former statute but imposed different and additional penalties operated as a repeal of the former statute. *Id.* at 92-93. As explained in the text above, neither the CEA nor the IAA embraces all conduct prohibited by the FTC Act.

As to petitioners' specificity argument, a more specific provision will displace a more general one only when there is a conflict between the two. See *Edmond* v. *United States*, 520 U.S. 651, 657 (1997). Even if the CEA and the IAA could be viewed as more specific than the FTC Act, there is no conflict between either the CEA or the IAA and the FTC Act because petitioners can simultaneously comply with each of these laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THE KEN ROBERTS COMPANY, UNITED STATES CHART COMPANY, KEN ROBERTS INSTITUTE, INC., and THE TED WARREN CORPORATION,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

Respondent's Opposition does little more than paraphrase the erroneous decision of the court of appeals. As a result, it does not address, much less refute, the strong arguments we have made why the Petition should be granted. Nevertheless, two of the points made by the Respondent warrant brief comment:

1. Respondent acknowledges that "the court of appeals did not definitively resolve [the] question" of "the FTC's jurisdiction to regulate" the petitioners' marketing practices. Opp. at 8. Parroting the court below, Respondent asserts that this is justified "because this case is a subpoena enforcement proceeding," in which petitioners have not demonstrated a "*patent* lack of [FTC] jurisdiction." *Id.*; *see id.* at 7-8 (emphasis added). But this is a meaningless standard that finds no support in the decisions of this Court.

Members of the public are entitled to judicial, "protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm. v. American Tobacco Co.*, 264 U.S. 298." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). For that reason, the courts will not enforce an agency subpoena where, as here, "[t]he evidence sought by the subpoena" is "irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). Accordingly, it was the obligation of the FTC to demonstrate — and the obligation of the courts below to determine — that the FTC's "inquiry [was] *within the authority of the agency*" before its Civil Investigative Demands could properly be enforced. *Morton Salt*, 338 U.S. at 652 (emphasis added).

Respondent overlooks or ignores that the instant case is not one in which a question of statutory coverage is among

the issues being investigated. It is in those situations that the courts will broadly recognize the agency's authority to investigate not only evidence of apparent violations but also the facts that may determine its jurisdiction to proceed. *See, e.g.*, *Endicott Johnson*, 317 U.S. at 507-509. As we have previously demonstrated, however, there is no dispute or question here concerning any jurisdictional fact. (*See* Pet. at 23-24.) It is substantially conceded that there is no fact the FTC investigation might uncover that could possibly affect the FTC's lack of authority over the Petitioners marketing activities. In these circumstances, there was no justification for the court of appeals' failure definitively to consider and decide the question of FTC authority and to decide it in Petitioners' favor.

2. Respondent also contends that there is no "clear repugnancy" between the provisions of the FTC Act and those of the CEA and the IAA because neither the CEA nor the IAA "*mandate* that petitioners engage in any unfair act or practice that the FTC Act prohibits." Opp. at 12 (emphasis added). But this "mandate" notion is not the standard this Court has established to determine a "clear repugnancy" between two statutory provisions.

A "clear repugnancy" dictating an implied repeal of earlier legislation must be found where the later statute "*permits* what the first law prohibits." *United States v. Tynen*, 78 U.S. 88, 93 (1870) (emphasis added). As we noted in our Petition, the CEA and IAA both prohibit the use of "any device, scheme, or artifice to defraud any client or prospective client," and conduct that "operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6; 7 U.S.C. § 6*o*. In contrast, the FTC Act prohibits "*unfair*" as well as "deceptive acts or practices." 15 U.S.C. § 45(a)(1) (emphasis

added). Thus, conduct that would not constitute an antifraud violation under the CEA and IAA might nonetheless violate the FTC Act's broader "unfair" standard. Given this "clear repugnancy," it follows that the antifraud provisions of the FTC Act has been impliedly repealed insofar as the conduct of CTAs and investment advisers is concerned. *See* Pet. at 14-19.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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